Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ROBERT T. KAPTURE, WARDEN,

Petitioner,

v.

DARRIN T. HATCHETT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a defendant need not demonstrate actual prejudice where his counsel's error resulted in the loss of an appeal from his conviction because there would be no way for a reviewing court to determine if the defendant had been prejudiced. Here, Respondent's counsel failed to take an interlocutory appeal from the juvenile waiver hearing that found that Respondent should be tried as an adult, but the waiver hearing and trial court's decision were available for review to enable a reviewing court to determine whether he was prejudiced.

Should the presumed prejudice standard under *Roe* be expanded to these circumstances?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a defendant need not demonstrate actual prejudice where his counsel's error resulted in the loss of an appeal from his conviction because there would be no way for a reviewing court to determine if the defendant had been prejudiced. Here, Respondent's counsel failed to take an interlocutory appeal from the juvenile waiver hearing that found that Respondent should be tried as an adult, but the waiver hearing and trial court's decision were available for review to enable a reviewing court to determine whether he was prejudiced.

The presumed prejudice standard under *Roe* should not be expanded to these circumstances 7

A. Introduction. 7

B. The requirement is that a defendant demonstrate prejudice to sustain a claim of ineffective assistance of counsel. 8

C. The prejudice standard from Roe does not apply to counsel's deficient failure to take an interlocutory appeal. 10
D. The district court in this case was able to fairly determine whether Respondent was actually prejudiced by the failure of his counsel to appeal the juvenile waiver. 13
E. Conclusion 16

RELIEF 17

TABLE OF AUTHORITIES

Cases

Beard v. Banks,
124 S.Ct. 2504 (2004) 10
Bell v. Cone,
535 U.S. 685 (2002) 9
Caver v. Straub,
349 F.3d 340 (6th Cir., 2003) 8
Flamer v. Delaware,
68 F.3d 710 (3d Cir., 1995) 12
Foster v. Johnson,
293 F.3d 766 (5th Cir. 2002) 12
Hatchett v. Kapture,
109 Fed. Appx. 34 (6th Cir. 2004) 1
Hill v. Lockhart,
474 U.S. 52 (1985) 9, 10, 16
Holland v. Jackson,
124 S. Ct. 2736 (2004) 8
Kimmelman v. Morrison,
477 U.S. 365 (1986) 12
Laboa v. Calderon,
224 F.3d 972 (9th Cir. 2000) 11
Miller v. Webb,
385 F.3d 666 (6th Cir. 2004) 8
Mitchell v. Mason,
325 F.3d 732 (6th Cir., 2003) 8
Patterson v. United States,
133 F.3d 645 (8th Cir. 1998) 12
Roe v. Flores-Ortega,
528 U.S. 470 (2000) ..... passim
Spytma v. Howes,
313 F.3d 363 (6th Cir. 2002) 12
State v. Jack,
676 A.2d 545; 144 N.J. 240 (N.J., 1996) 12

Strickland v. Washington,
466 U.S. 668 (1984) ..... passim
United States v. Stewart,
388 F.3d 1079 (7th Cir. 2004) 12
Valdez v. Ward,
219 F.3d 1222 (10th Cir. 2000) 12

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2254 1
28 U.S.C. §2254 5
M.C.L. 712A.4(4) 14

Other Authorities

U.S. Const. Amend. VI 2

OPINIONS BELOW

The decision of the Michigan Court of Appeals affirming Respondent's conviction on direct appeal was filed on March 10, 1989, but was not published. *People v. Hatchett*, No. 104510 (Mich. Ct. App. March 10, 1989), App. 26a. Respondent sought leave to appeal this decision in the Michigan Supreme Court. On November 29, 1989, the Michigan Supreme Court denied leave to appeal. *People v. Hatchett*, No. 85743, 433 Mich. 909 (1989), App. 29a.

Respondent raised the claim which forms the basis of this appeal for the first time in a state collateral proceeding. The Michigan Court of Appeals rejected that appeal in an unpublished order. *People v. Hatchett*, No. 209790 (Mich. Ct. App. Mar. 1, 1999), App. 30a. The Michigan Supreme Court likewise denied relief by unpublished order. *People v. Hatchett*, No. 114355 (Mich. Sup. Ct. Sept. 29, 1999), App. 31a.

Respondent filed for habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan, which on March 6, 2003, denied Respondent habeas relief, in part, for failure to demonstrate he was actually prejudiced by his attorney's failure to appeal the juvenile waiver order. *Hatchett v. Kapture*, Eastern District of Michigan No. 00-cv-74340, App. 8a. Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On August 19, 2004, the Court of Appeals entered its opinion reversing the decision of the district court, finding Respondent was not required to demonstrate actual prejudice. *Hatchett v. Kapture*, 109 Fed. Appx. 34 (6th Cir. 2004), App. 2a. The Court of Appeals denied the State's petition for rehearing *en banc* by order dated November 22, 2004, App. 1a.

JURISDICTION

The Court of Appeals opinion reversing the district court's denial of habeas relief was entered on August 19, 2004, App. 2a. Respondent's Petition for Rehearing *en banc* was denied on November 22, 2004, App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The constitutional and statutory provisions involved in this petition are as follows:

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In 1986, while he was a juvenile, Darrin Hatchett shot and killed a classmate, Rodney McRae. The facts adduced at his jury trial were largely undisputed. Respondent and the victim had a few fights at school. During the evening of December 29, 1986, Respondent was at Michael Howard's house playing pool. Several other youths were also present. At some point McRae arrived. McRae asked Respondent if he was still mad at him. Respondent told him to "shut-up" and left the house.

A few minutes later Respondent returned, produced a revolver, pointed it in McRae's direction, and declared: "Talk your junk now, punk."

From across the pool table, Respondent shot McRae two times in the chest and side, and McRae fell to the floor. Respondent then walked over to where McRae fell and shot him two more times in the head. Afterwards, several of the people present helped clean up the blood and dispose of the body in a dumpster. Three of the youths present, all friends with both Respondent and the victim, testified to this account. (Eric Minor, Tr., pp. 8-13, App. 32a; Michael Howard, Tr., pp. 34-38, App. 41a; Lloyd Whitfield, Tr., pp. 59-62, App. 48a).

Respondent testified in his own defense, claiming a hybrid accident/self-defense theory: "When I got in the basement, I went to the other side of the room, and me and Rodney were arguing a little more, and I pulled the gun and said, talk your junk. I aimed the gun like that and said that and I fired it, and I didn't know if he grabbed – it looked like he went for something and I shot some more." (Tr., p. 79, App. 54a). Respondent explained that he was aiming so that he would fire over the victim's shoulder, but the bullet hit him. (Tr., p. 80, App. 55a). At the same time he saw the victim grab toward his side, so Respondent shot him some more, including in the head. (Tr., pp. 80-81, App. 55a).

Because Respondent was a juvenile when this occurred, under Michigan law in effect at the time the prosecutor was required to commence proceedings against him in the probate court. A probable cause hearing was held on January 20, 1987. Respondent does not contest anything that transpired during this hearing, and at its conclusion probable cause was found to believe that a crime was committed and that Respondent perpetrated it.

On March 10, 1987, a waiver hearing was held after which Respondent was waived over to the circuit court for trial as an adult. Respondent does not allege that any error occurred in the waiver hearing either.

The late Charles Campbell was then appointed to represent Respondent. He did not appeal from the waiver of juvenile court jurisdiction to the trial court, despite Respondent's present claim that he was requested to do so. It is this inaction that forms the basis of the Sixth Circuit's decision that Respondent was denied the effective assistance of counsel.

At trial, Respondent was represented by new counsel, and after the evidence summarized above was presented, the trial court found Respondent guilty of second-degree murder and felony-firearm, and Respondent was sentenced to life imprisonment.

Respondent was appointed appellate counsel to handle his appeal. His appellate attorney filed an appeal of right and raised two issues in the appellate brief: 1) that there was insufficient evidence to sustain the conviction, and 2) that the life sentence was excessive.

The Michigan Court of Appeals affirmed Respondent's conviction and sentence in an unpublished opinion. *People v. Hatchett*, No. 104510 (Mich. Ct. App. March 10, 1989), App. 26a. Subsequently, the Michigan Supreme Court denied leave to appeal by standard order. *People v. Hatch*ett, No. 85743 (Mich. Sup. Ct. Nov. 29, 1989), App. 29a.

Thereafter Respondent unsuccessfully pursued collateral review in the state courts, where he raised among other claims, his argument that attorney Campbell was ineffective for failing to appeal the waiver from juvenile court. *People v. Hatchett*, No. 209790 (Mich. Ct. App. Mar. 1, 1999), App. 30a; *People v.*

Hatchett, No. 114355 (Mich. Sup. Ct. Sept. 29, 1999), App. 31a.

Respondent then filed for Federal habeas relief under 28 U.S.C. § 2254. The district court denied the writ on the merits. With respect to the instant issue, the court found that Respondent had not demonstrated that he was actually prejudiced by the failure of his counsel to appeal the juvenile waiver:

> Given the probate court's reasoned opinion, as well as the nature of the crime and the recommendation of an expert witness that Petitioner be tried as an adult, it is unlikely that Petitioner would have prevailed if Charles Campbell had appealed the probate court's decision to waive jurisdiction. Petitioner has not demonstrated a reasonable probability that, but for Campbell's failure to appeal the probate court's decision, the result of the proceeding would have been different. [*Hatchett v. Kapture*, USDC 00-CV-74340-DT, Opinion dated March 6, 2003].

Respondent appealed this decision to the United States Court of Appeals for the Sixth Circuit, arguing in part, that he was not required to demonstrate that the result of the proceedings would have been different had his attorney appealed the juvenile waiver in light of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). The State argued, among other things, that *Roe* did not apply because this case involved the failure to take an appeal from an interlocutory order, as opposed to the failure to take an appeal from the conviction itself. This Court of Appeals reversed, finding that *Roe* applied to such claims:

> Hatchett argues that to prove his ineffective assistance of counsel claim under the Sixth Amendment, he need not show the merit of his appeal, but must show (1) that counsel's representation fell

below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687, and (2) that counsel's deficient performance prejudiced the defendant. *Id.* at 692. We agree.

Prejudice is sufficient to satisfy the second prong of *Strickland*. Prejudice is presumed from counsel's failure to file a notice of appeal when requested by his client. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000).

The district court, however, concluded that Hatchett must in addition demonstrate in his 28 U.S.C. § 2254 petition that his appeal had some merit. In *Roe*, the Supreme Court held that counsel's failure to pursue an appeal requested by a defendant constitutes ineffective assistance of counsel regardless of the likelihood of success on the merits. *Id.* at 486. [*Hatchett v. Kapture*, 109 Fed. Appx. 34, 37 (6th Cir. 2004)].

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred when it held that in a claim of ineffective assistance of counsel for failure to pursue an interlocutory appeal from a juvenile waiver hearing, a criminal defendant is not required to demonstrate that his interlocutory appeal would have likely succeeded The Court of Appeals' ruling thus greatly expands the holding in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), where this Court found that a defendant need not demonstrate actual prejudice in cases where counsel's deficient performance resulted in the loss of an appeal of the conviction itself. The rationale of *Roe*, however, should not be extended to claims such as Respondent's. As is the case with ordinary claims of ineffective assistance of counsel, a reviewing court is able to discern whether a defendant was actually prejudiced by the loss of an interlocutory appeal. Therefore, in such cases a defendant

should be required to demonstrate actual prejudice under the general standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Still worse, the Court of Appeals expanded a rule of constitutional law on habeas review of a state conviction even though such expansions of constitutional rules are prohibited in such proceedings. *Beard v. Banks*, 124 S.Ct. 2504, 2511 (2004). This Court should grant *certiorari* in this case of first impression to determine which prejudice standard governs such claims of ineffective assistance of counsel.

I. Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a defendant need not demonstrate actual prejudice where his counsel's error resulted in the loss of an appeal from his conviction because there would be no way for a reviewing court to determine if the defendant had been prejudiced. Here, Respondent's counsel failed to take an interlocutory appeal from the juvenile waiver hearing that found that Respondent should be tried as an adult, but the waiver hearing and trial court's decision were available for review to enable a reviewing court to determine whether he was prejudiced.

The presumed prejudice standard under *Roe* should not be expanded to these circumstances.

A. Introduction.

This case raises for the first time the standard of prejudice to be applied to the loss of an appeal other than an appeal of the conviction itself due to the deficient performance of a criminal defendant's counsel.

The Court of Appeals erroneously expanded this Court's holding in *Roe* and found that to prevail on his claim of ineffective assistance of counsel for counsel's failure to pursue an interlocutory appeal, Respondent was only required to show

that he would likely have appealed the juvenile waiver order, rather than show an appeal would have likely been meritorious.

This case evidences a continuing trend by the Court of Appeals in which it has either given short shrift or abandoned the *Stickland* actual prejudice standard in reviewing state court convictions. See, e.g., *Miller v. Webb*, 385 F.3d 666, 673, 676 (6th Cir. 2004) (presuming prejudice where counsel failed to object to seating of biased juror); *Caver v. Straub*, 349 F.3d 340, 349-350 (6th Cir., 2003) (presuming prejudice where counsel was absent when jury was re-read identical portion of jury instructions); *Mitchell v. Mason*, 325 F.3d 732, 742 (6th Cir., 2003) (presuming prejudice where counsel suspended from practice of law for thirty-day period preceding trial); *Holland v. Jackson*, 124 S. Ct. 2736, 2737 (2004) (summarily reversing Sixth Circuit's treatment of the *Strickland* prejudice prong).

Respondent should have been required to demonstrate actual prejudice because Respondent's claim of ineffective assistance of counsel is no different from ordinary claims of ineffective assistance of trial counsel where it is possible to discern whether actual prejudice occurred. That is, a reviewing court may readily review the record of the juvenile waiver proceeding and determine whether an appeal would have likely been successful. Furthermore, Respondent was afforded new counsel on appeal from his conviction, who was able to review the record to determine if there was an issue of ineffective assistance of counsel that caused his client actual prejudice.

B. The requirement is that a defendant demonstrate prejudice to sustain a claim of ineffective assistance of counsel.

The general rule under the Sixth Amendment is that a defendant must show actual prejudice – he must demonstrate a reasonable probability that the result of the proceeding would

have been different - to sustain a claim of ineffective assistance of counsel under the Sixth Amendment. *Strickland*, 466 U.S. at 694. Among other things, this actual prejudice standard has been widely applied to situations where counsel failed to seek various types of hearings and proceedings prior to trial. But this Court has also carved out a limited number of exceptions to *Strickland's* general actual prejudice rule in which prejudice is presumed. See: *Bell v. Cone*, 535 U.S. 685, 695-696 (2002) (listing three categories of cases where prejudice is presumed):

> 1) the complete denial of denial of counsel at a critical stage;
>
> 2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and
>
> 3) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not.

Finally, in two cases this Court applied a prejudice standard that falls somewhere between the actual prejudice standard articulated in *Strickland*, and the presumed prejudice standard described in *Bell*. First, in *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), this Court found that when counsel's deficient performance resulted in the defendant pleading guilty instead of standing trial, the defendant need not show that he likely would have prevailed at a trial to demonstrate prejudice. Rather, he must show only "that there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial."

Second, in *Roe* this Court found that when counsel's deficient performance resulted in the loss of a direct appeal from a conviction, to demonstrate prejudice the defendant must demonstrate merely "that there is a reasonable probability that,

but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." 528 U.S. at 484. He need not show that he had meritorious claims on appeal, or that he likely would have prevailed on appeal.

This Court has not yet determined whether *Roe* and *Hill* should be limited to those two particular claims, or whether, and to what extent, such a modified *Strickland* standard should be applied to various other claims of ineffective assistance of counsel.

C. The prejudice standard from Roe does not apply to counsel's deficient failure to take an interlocutory appeal.

The Court of Appeals misinterpreted *Roe* as creating a rule to be applied in a broader context. It expanded the modified prejudice standard and applied it to a situation where the defendant is deprived of an interlocutory appeal by his counsel's deficient performance. This Court should grant review to foreclose this sort of expansion of *Roe* and *Hill*, and demand the Court of Appeals' compliance with *Strickland.* As indicated above, this case is the latest in a series of cases decided by the Sixth Circuit in which it has modified or abandoned the prejudice prong of *Strickland* in reviewing state court convictions. Such a modification of a constitutional rule is prohibited on habeas review. *Beard v. Banks*, 124 S.Ct. 2504, 2511 (2004).

Where, as here, counsel fails to adequately advise his client regarding the availability of appealing a juvenile waiver order, the situation is materially different from *Roe*. Here a record exists from which actual prejudice can be ascertained from that failure. Furthermore, Respondent was still afforded a direct review of his conviction in which the trial record could have been examined for other potential claims. Therefore, Respondent's ineffective assistance of counsel claim is

substantially equivalent to ordinary claims of ineffective assistance of trial counsel in which actual prejudice must be shown.

In *Roe* this Court found that a defendant who lost the appeal from his conviction need not show actual prejudice because the error led to loss of the proceeding itself. It was not merely a question of determining whether an attorney error during a proceeding rendered the proceeding unreliable. The Court reasoned that it was impossible to determine whether a proceeding's reliability was affected by counsel's mistakes when the mistake resulted in the loss of the entire proceeding. *Roe*, 528 U.S. at 483.

The *Roe* rationale does not apply to the failure to take an interlocutory appeal from a pretrial juvenile waiver hearing. Courts routinely require defendants to demonstrate actual prejudice when their counsel's deficient performance resulted in the loss of a pretrial proceeding.

For example, where an attorney unreasonably fails to move for a pretrial hearing to suppress an eyewitness identification on the ground that the procedure was unduly suggestive, it is equally impossible to determine the reliability of the pretrial hearing, because it was never held. The same is true of lost pretrial hearings challenging the voluntariness of confessions, or challenging the legality of a search and seizure. Courts routinely apply the actual prejudice standard from *Strickland* to such circumstances.

For example, in *Laboa v. Calderon*, 224 F.3d 972, 981 (9th Cir. 2000), defense counsel deprived the defendant of an opportunity to have a pretrial hearing determining the admissibility of his confession. Still the Ninth Circuit required the defendant to demonstrate actual prejudice by showing that such a pretrial challenge would have affected the outcome of his trial. See also, e.g., *Valdez v. Ward*, 219 F.3d 1222, 1244

(10th Cir. 2000); *Patterson v. United States*, 133 F.3d 645, 648 (8th Cir. 1998); and *Flamer v. Delaware*, 68 F.3d 710, 728 (3d Cir., 1995).

Likewise, in *Kimmelman v. Morrison*, 477 U.S. 365, 390-391 (1986), this Court required the defendant to demonstrate that his counsel's failure to request a pretrial hearing to suppress evidence under the Fourth Amendment resulted in actual prejudice. The Court found that the defendant was required to show there was a reasonable probability that the verdict would have been different had the challenged evidence been excluded. See also, e.g., *United States v. Stewart*, 388 F.3d 1079, 1084 (7th Cir. 2004).

Finally, the actual prejudice standard has even been employed by the Fifth Circuit Court of Appeals in a case with a claim substantially similar to Respondent's. In *Foster v. Johnson*, 293 F.3d 766, 789 (5th Cir. 2002), the Fifth Circuit found that counsel rendered deficient performance for failing to file a motion to transfer a case to juvenile court, but found no actual prejudice because: "given [defendant's] age and the [psychiatric evaluation] findings, it was not reasonably probable that the outcome would have been different (i.e., that the trial court would have granted a transfer motion) if [counsel] had filed a transfer motion." See also, e.g., *Spytma v. Howes*, 313 F.3d 363, 372 (6th Cir. 2002) (even if lost appeal of juvenile waiver had been successful, juvenile court would have waived jurisdiction after second waiver hearing); *State v. Jack*, 676 A.2d 545, 548-551;144 N.J. 240, 248-254 (1996).

The reason that all these claims of ineffective assistance of counsel may be resolved using the unaltered *Strickland* actual prejudice standard is because it is possible to determine the reliability of the result reached at trial and on direct appeal, despite the fact that a pretrial proceeding was altogether lost. In none of these cases was the defendant deprived of the trial itself or of plenary appellate review at the conclusion of the

trial proceedings. For example, one can look at the evidence produced at trial in each of these cases and determine whether suppressing the disputed evidence likely would have made a difference. Likewise, in each of these cases the defendant was afforded counsel on direct appeal who was able to raise claims asserting trial counsel's failures for failure to request the pretrial hearing.

Unlike the facts of *Roe*, Respondent's failure to take the interlocutory appeal to the trial court on the issue of the juvenile waiver did not "deprive[] [Respondent] of the appellate proceeding altogether." *Roe*, 528 U.S. at 483. Rather, counsel, through his deficient performance, merely foreclosed review of one issue -- whether the juvenile waiver was valid. And while Respondent's new appellate counsel may have lost the ability to directly raise the underlying issue of the propriety of the juvenile waiver under Michigan law, he was not prohibited from raising an ineffective assistance of counsel claim for failing to file the interlocutory appeal. That is, Respondent was left in the same position as a defendant in ordinary ineffective assistance of counsel cases challenging counsel's failure to request any sort of pretrial hearing. Respondent did just that during state collateral review, and his appellate counsel very well could have raised that claim on direct review.

D. The district court in this case was able to fairly determine whether Respondent was actually prejudiced by the failure of his counsel to appeal the juvenile waiver.

In this case, the district court was able to fairly determine whether Respondent could demonstrate actual prejudice. Unlike the situation in *Roe,* Respondent had no less than two state court appeals in which a record was, or could have been, developed and reviewed to determine the strength of an appeal from the juvenile waiver.

Indeed, the record shows that Respondent had no chance of being treated as a juvenile, and that any appeal from the juvenile waiver proceeding would have been futile. Under Michigan law existing at the time of Respondent's trial, M.C.L. 712A.4(4), the juvenile court was required to consider five criteria in determining whether to waive jurisdiction over a juvenile:

(a) The prior record and character of the child, his physical and mental maturity and his pattern of living.

(b) The seriousness of the offense.

(c) Whether the offence, even if less serious, is part of repetitive pattern of offenses which would lead to a determination that the child may be beyond rehabilitation under existing juvenile programs and statutory procedures.

(d) The relative suitability of programs and facilities available to the juvenile and criminal court for the child.

(e) Whether it is in the best interests of the public welfare and the protection of the public security that the child stand trial as an adult offender.

At the waiver hearing the only witness addressing Petitioner's suitability for waiver was Thomas Regan, a psychologist with the Wayne County Clinic for Child Study. Regan testified that Respondent suffered from a lot of inner hostility and that his thinking was quite confused. T 3/10/87, p. 67, App. 59a. Regan opined that he was the type of person who once stimulated, becomes very intense and has difficulty backing off. *Id.*, p. 68, App. 60a. Respondent has disregard for rules and authority, he is egocentric, impulsive, and self-indulgent. *Id.*, p 68, App. 60a. Regan felt that Respondent

required long term incarceration because of the morbidity of his pathology and his instability. *Id.*, p 71, App. 62a. He viewed Respondent as being very unstable, very disturbed, and strongly delinquent. *Id.*, p 72, App.63a. Regan thought Respondent was going to have emotional difficulties most of his life, and that he would only be able to make marginal adjustments. *Id.*, p 81, App. 65a. Regan did not believe that there was enough time left in the juvenile system for Respondent to improve to the point where he could begin to function without hostility or intense feelings. *Id.*, p 82, App. 66a. Regan described his prognosis as poor. *Id.*, p 92, App. 68a. There was no testimony offered at the hearing recommending that Respondent be treated as a juvenile.

Following the waiver hearing, the probate judge placed its findings on the record and essentially adopted Regan's testimony, *Id.*, p 143-149, App. 70a, and on March 27, 1987, the probate Judge subsequently issued a written opinion and order waiving Petitioner to the circuit court for trial as an adult. App. 78a.

Based on this record, the district court was able to fairly conduct the sort of analysis that courts routinely perform when they examine other claims of ineffective assistance of counsel. Just as a court may conclude that counsel was not ineffective for failing to move to suppress a confession because the facts of the confession did not give rise to an arguable Fifth Amendment claim, so too can a court look at the record of a juvenile waiver hearing and determine that Respondent did not have an arguable claim that he met the standard for being treated as a juvenile.

Unlike *Roe* Respondent was not denied the opportunity to have an attorney explore the potential merits of such an argument. Respondent was not deprived of a direct appeal of his conviction. During that appeal his appellate counsel could

have asserted the same claim of ineffective assistance of trial counsel, that Respondent presented in this action.

E. Conclusion

Hill and *Roe* involved unique circumstances in which the deficient performance of counsel deprived a criminal defendant of his trial or an opportunity to review the propriety of the conviction itself on appeal. The absence of these critical judicial proceedings made it difficult, if not impossible, for a reviewing court to determine whether the defendant had been actually prejudiced by his attorney's deficient performance. Here the record of the waiver proceedings and the appeal from conviction afforded the reviewing court the opportunity to determine actual prejudice. The Court of Appeals erred by unnecessarily extending this Court's presumed prejudice standard in *Roe* to these circumstances.

RELIEF

The petition for *certiorari* should be granted.

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